

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2596 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?  
Nos. 1 to 5 No
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SIDIKBHAI DHANABHAI MIYANA

Versus

COMMISSIONER OF POLICE

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Appearance:

MR ANIL S DAVE for Petitioner

MS.SIDDHI TALATI ASSISTANT GOVERNMENT PLEADER

for Respondent No. 1, 2, 3

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 18/11/98

ORAL JUDGEMENT

This writ petition under Article 226 of the Constitution of India has been filed by the petitioner praying for a writ of certiorari for quashing the detention order dated 21.2.1998 passed by the Detaining Authority against him and for a writ of habeas corpus directing immediate release of the petitioner from illegal detention.

The brief facts giving rise to this petition are that in exercise of powers under section 3(2) of the

Gujarat Prevention of Antisocial Activities Act, 1985 (for short 'PASA') the Detaining Authority passed an order for preventive detention of the petitioner. The grounds for detention were furnished to the petitioner. In short the grounds for detention are that the petitioner is a bootlegger indulging in sale of country made liquor and as many as six cases under Prohibition Act, were registered against him which were between the years 1996 to 1998. He was enlarged on bail in all these cases. He was also externed under section 93 of the Prohibition Act and under Bombay Police Act. Still he did not stop his illegal activity of sale of country made liquor which is injurious to the public health and was also likely to cause hooch tragedy as had occurred in past taking lives of several persons. In addition to these, two incidents of 20.1.1998 and 5.2.1998 were incorporated in the grounds of detention. These incidents were narrated by four witnesses. The identity of the witnesses was kept secret in view of section 9(2) of the PASA Act. These two incidents according to the Detaining Authority, were enough to form subjective satisfaction that the activities of the petitioner amounted to hindrance in the maintenance of public order.

The petitioner made representation to the Detaining Authority as well as to the State Government. The representation to the Detaining Authority was rejected but the State Government did not consider the representation of the petitioner on the ground that it was not signed by the detenu. The representation to the State Government was given by the Advocate of the detenu.

The order of detention contained in Annexure 'A' to the petition was challenged only on two grounds. The first was that the activities of the petitioner did not amount to disturbance of public order. Hence, the order of detention is bad. The second ground was that the representation made by the petitioner's Advocate was not considered by the State Government and as such the detention and continued detention of the petitioner is rendered illegal.

Having heard learned Counsel for the parties on these two grounds I find that the second ground regarding representation has force. A counter affidavit has been filed by Shri J.R.Rajput, Under Secretary, Government of Gujarat. In para 2 of his affidavit he admitted that the representation dated 2.4.1998 signed by the Advocate of the detenu addressed to the Home Minister of the State was received on 15.4.1998. A copy of the representation as well as english translation has been annexed along

with the affidavit. It is further deposed in the same para that since the representation did not bear signature of the detenu it was decided by the Home Department not to take the said representation into consideration and communication dated 15.4.1998 was sent to the Advocate of the detenu under intimation to the detenu. It is thus clear that the representation of the petitioner sent through his Advocate has not been decided so far and it was considered by the State Government not to take into consideration this representation because it did not bear signature of the detenu. This stand of the State Government is highly technical and such technical view was not approved by the Apex Court in Balchand Chorasias Vs. Union of India, AIR 1978 SC Pg.297. In this case also the representation of the detenu was sent by his Advocate Shri Ramjethmalani who happened to be the Member of Parliament at that time. The representation of the detenu was not considered by the Government on the ground that it was not from the detenu. The High Court accepted the stand of the Government. The Apex Court however, observed that Shri Ramjethmalani did not send the representation in the capacity as Member of Parliament, rather, it was sent by him as an Advocate of the detenu-petitioner. The Apex Court proceeded to observe that where the liberty of a citizen is proposed to be curtailed and he is to be put under preventive detention his representation should not be viewed with such technicality and a liberal view should have been taken. According to the Apex Court, after considering the representation it was observed that it was a representation from the Advocate of the detenu and since it was not considered by the Government the order of detention becomes illegal. Applying the said verdict on the facts of the case before me I find that non consideration of the representation of the detenu on technical ground, though it was sent by the Advocate on behalf of the detenu, has rendered the detention as well as continued detention of the petitioner illegal. On this ground alone the order of detention can be quashed.

The second ground of attack is that the alleged activities of the petitioner have not disturbed the maintenance of public order. This ground also cannot be brushed aside. Registration of as many as six cases under Prohibition Act per se does not amount to activities of the petitioner which had disturbed the public order in the locality where such business was done by him. The previous incident of hooch tragedy, on account of consumption of country made liquor in which several persons died should be no ground for apprehension or panic that it may occur again at any time in future if

anybody takes or consumes country made liquor and he will face the same tragedy. There is no averment in the grounds of detention that at any point of time the petitioner was found selling poisonous or contaminated country made liquor which is per se injurious to public health.

Another ground of detention is that the petitioner is bootlegger. A person on the facts and circumstances of the case who indulged in sale of country made liquor can be said to be bootlegger within the definition of section 2(b) of the PASA Act. But the question is whether a bootlegger necessarily disturbs the public order whenever he indulges in business of country made liquor. The Supreme Court in oft quoted decision in the case of Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 observed in clear terms that merely because a person is bootlegger within the definition of section 2(b) of the PASA Act, he cannot be placed under preventive detention unless his activities are such which disturbs the maintenance of public order. The distinction between public order and law and order was highlighted in this case. Stray incidents between the petitioner and two witnesses on two dates when the petitioner threatened them as well as beat them cannot safely be considered to be disturbance of public order. A public order is said to have been disturbed in a locality or in an area when public at large feels insecured and even tempo of life in the locality is disturbed. If people in the locality became panicky on account of prejudicial activities of the petitioner, certainly it can be held that public order was disturbed from such activities. However, simply because on two occasions the petitioner gave threat to the two witnesses who objected to the activities of the petitioner and also because they were beaten it does not constitute disturbance of public order.

If the activities of the petitioner do not constitute disturbance of public order consideration by the Detaining Authority of alternative remedies will not validate the impugned order.

For the reasons stated above the impugned order of detention becomes illegal and cannot be sustained. As a result thereof the writ petition succeeds and is hereby allowed. The impugned order of detention dated 21.2.1998, Annexure "A" to the writ petition is hereby quashed. The petitioner shall be released forthwith unless he is wanted in connection with any other criminal case.

Sd/-  
(D.C.Srivastava, J)

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m.m.bhatt